

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK STEVEN CANN	:	CIVIL ACTION
	:	
v.	:	
	:	
HAROLD ROBERT WANNER	:	No. 05-5189
	:	
O'NEILL, J.	:	JUNE 28, 2006

MEMORANDUM

Plaintiff, Mark Steven Cann, pro se, filed a complaint in the Court of Common Pleas of Berks County on September 2, 2005 against defendant, Harold Robert Wanner, alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution based on civil rights claims of false arrest and false imprisonment as well as a state law claim of intentional infliction of emotional distress. Defendant removed the action to this Court. Before me now are defendant's motion to dismiss and plaintiff's response thereto.

BACKGROUND

On December 17, 2004, Cann and a co-worker, Zhouyio Ouyiang, were returning from Altoona, Pennsylvania after completing a delivery job in the scope of their employment with Discount Food Markets. During this drive, Cann received a call on his cell phone from his girlfriend. Cann pulled the delivery truck into the parking lot of a Giant Food store, informed Ouyaing "that he had to take care of something," and entered the store while Ouyaing remained in the truck. After approximately five minutes, Cann exited the store and began to walk back to the truck.

At this time, Christopher Kretz, an employee at the Giant Food store, stated that he witnessed two individuals approach the truck and that it appeared that they were talking to Cann

outside the vehicle. Kretz stated he believed one of the individuals to be female and the other male, and that the interaction “actually looked like a drug deal.” Other witnesses standing in front of the store stated that they saw two individuals walk across the parking lot prior to Cann’s entering the store and that it seemed that the individuals had then disappeared for a short time, possibly hiding behind a parked car. These witnesses also stated that when Cann walked out of the store the two individuals reappeared and approached him. Like Kretz, these witnesses believed one of the individuals to be female and the other male.

Ouyaing stated that as Cann opened the door of the truck he heard Cann say something and saw a male individual with a gun and a knife. The male took Cann’s wallet but did not open it, and then tossed it on the floor of the truck. He entered the truck and demanded money from Ouyaing. When Ouyaing told him that he did not speak English, the male struck Ouyaing in the head with his gun. Ouyaing then handed over \$2,429.00 in cash that he had in two bank envelopes; the male also grabbed a gold chain off of Ouyaing’s neck. Neither Cann’s wallet nor any other of his property were stolen; he was not struck during the robbery.

After the individuals ran away, Cann called 911. Defendant, Detective Wanner, the investigating officer assigned to the robbery, arrived at the scene and ordered Cann to come to the Cumru Police Station. Accompanied by his girlfriend, Laurel Galvin,¹ Cann went to the station and was questioned by Wanner. Wanner also questioned Galvin concerning several phone calls between her and Cann on December 16. Both Cann and Galvin have criminal records. On December 20, Wanner gave Cann a lie detector test and told him that he passed. Wanner also said that he believed Galvin was involved in the robbery and asked that Cann bring him any information that seemed to implicate her.

¹In his motion to dismiss, Wanner refers to Galvin as “Gavin”; however, Cann refers to her as Galvin in his complaint. I will refer to her as Galvin.

On December 22, Cann called Wanner and told him that Galvin had just threatened to contact Wanner, confess to the crime, and name Cann as a co-conspirator if Cann did not give her back her jewelry. On December 23, Cann brought Wanner letters written to Galvin by a woman that implied that Galvin had sexual relations with various women. On December 28, Cann brought Wanner a card from Galvin to the same woman in which Galvin wrote that she was happy because she was not going to prison for a crime she had committed recently. On January 12, 2005, Wanner requested, and Cann provided, cell phone records of calls between Cann and Galvin. Wanner told Cann that he knew Galvin was involved and Cann asked what would happen to him if Galvin did implicate him. Wanner responded that he would do what he could to ensure that Cann would not be implicated.

During the course of the investigation, Galvin confessed to Wanner that she and Cann had planned the robbery and told him that she had been Cann's girlfriend at the time. She stated that, in the course of planning the crime, Cann had informed her that on the days his business route took him to Altoona there would be as much as \$10,000 in cash in the delivery truck. She also said Cann had told her that the money would help them out financially. Wanner learned that it was Galvin and another male co-conspirator who had approached Cann outside the truck and pretended that they were robbing him. Wanner was told that after the robbery, while driving away and counting the cash, Galvin had grown upset because Cann had told her there would be more money. Galvin had then met with Cann later that morning when he returned to the store where he worked. The cell phone records that Wanner collected revealed that Galvin had been in contact with Cann throughout the night before the robbery until the early morning hours of the day of the robbery and leading up until approximately five minutes before the crime occurred.

Based on Galvin's confession and the other information he collected during his

investigation, Wanner prepared an application for an arrest warrant. A District Justice reviewed the application and issued and signed an arrest warrant on February 3, 2005 for robbery, aggravated assault, receiving stolen property, and false reports to law enforcement authorities. Wanner then arrested Cann pursuant to this duly executed warrant.

At Cann's preliminary hearing, a Judge heard all the facts and gave Cann an opportunity to cross-examine the witnesses presented against him. Galvin testified under oath and restated the information that Wanner had used in his warrant application. The Judge held that the Commonwealth had established a prima facie case against Cann and ordered a trial. On September 2, 2005, Cann commenced this action by filing a complaint against Wanner for violations of the Fourth and Fourteenth Amendments of the United States Constitution, alleging that Wanner arrested him "without any tangible proof or evidence."

Cann's underlying criminal case was recently tried before a jury in the Court of Common Pleas of Berks County. On May 10, 2006, he was found guilty of robbery pursuant to 18 Pa. Con. Stat. §3701, theft by unlawful taking pursuant to 18 Pa. Con. Stat. §3921, criminal conspiracy pursuant to 18 Pa. Con. Stat. §903, and false report pursuant to 18 Pa. Con. Stat. §4906 for falsely incriminating another. Cann is now confined at the Montgomery County Correctional facility in Norristown, Pennsylvania.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In ruling on a 12(b)(6) motion, I must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in plaintiff's complaint and must determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief."

Nami v. Fauver, 82 F.3d 63, 65 (3d. Cir. 1996) (citations omitted). Nevertheless, in evaluating plaintiff's pleadings, I will not credit any "bald assertions." In re Burlington Coat Factory Sec. Litig., 114 F. 3d 1410, 1429 (3d Cir. 1997). Nor will I accept as true legal conclusions or unwarranted factual inferences. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff's cause of action." Nami, 82 F.3d at 65. A Rule 12(b)(6) motion may be granted only if it appears that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46.²

DISCUSSION

Cann alleges in his complaint that Wanner "issued the warrant without any tangible proof" in violation of the Fourth and Fourteenth Amendments to the United States Constitution. In Counts I and II, Cann claims that the warrant, and subsequent arrest and imprisonment, were based solely on the credibility of Galvin in her confession to the robbery and that Wanner's conduct was tantamount to false arrest and false imprisonment. In Count III, Cann claims that Wanner "intended his action" to cause Cann to "suffer extreme emotional distress."

Wanner argues that Cann's complaint should be dismissed for failure to state a claim because: (1) with respect to Counts I and II, Cann fails to demonstrate that Wanner lacked probable cause for arresting and imprisoning him; and (2) with respect to Count III, Wanner had probable cause for making the arrest and Cann is unable to prove that Wanner's conduct was

²As a general rule, a court is permitted to consider only the allegations in the complaint, exhibits attached to the complaint and matters of public record when deciding on a 12(b)(6) motion to dismiss. Pension Benefit Guar., Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). However, a court may also "consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Id.

sufficiently extreme and outrageous to qualify for a claim of intentional infliction of emotional distress. For the reasons that follow, I will grant Wanner's motion to dismiss with respect to all counts.

I. Counts I and II - False Arrest and False Imprisonment

Allegations of false arrest and false imprisonment both depend upon findings of probable cause to arrest. Walker v. Spiller, 54 F. Supp. 2d 421, 427 (E.D. Pa. 1999). An arrest based on probable cause cannot "become the source of a claim for false imprisonment" with respect to the detention resulting from that arrest. Groman v. Township of Manalapan, 47 F. 3d 628, 637 (3d Cir. 1995), citing Baker v. McCollan, 443 U.S. 137, 143-144 (1979).

A. Probable Cause Without Arrest Warrant

Cann argues that Wanner violated his Fourth Amendment rights by arresting him without probable cause "on the strength of Laurel Galvin's word." "The Fourth Amendment prohibits a police officer from arresting a citizen without probable cause." Paff v. Kaltenbach, 204 F.3d 425, 435 (3d Cir. 2000). "Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-176 (1949) (internal quotations omitted). The Supreme Court employs a "totality of the circumstances" standard for determining the existence of probable cause. United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir. 1984), citing Illinois v. Gates, 462 U.S. 213 (1983). "It is the function of the court to determine whether the objective facts available to the officers at the time of the arrest were sufficient to justify a reasonable belief that an offense was being committed." Id at 1205. This standard seeks to "safeguard citizens from rash and unreasonable interferences with privacy"; however, it also

seeks to provide officers with “fair leeway for enforcing the law in the community’s protection” at the same time. Brinegar, 338 U.S. at 176. “Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.” Id at 176.

Probable cause determinations necessarily deal with probabilities as opposed to technicalities. Gates, 462 U.S. at 241. The Supreme Court has defined such probabilities as “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” Brinegar, 338 U.S. at 175. In weighing these considerations, law enforcement authorities are entitled to draw reasonable inferences based upon their personal knowledge and prior experience. United States v. Ortiz, 422 U.S. 891, 898 (1975). Additionally, when a court makes its own probable cause determination, the evidence collected “must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.” Gates, 462 U.S. at 231. To establish probable cause, “the standard of proof is . . . correlative to what must be proved.” Brinegar, 338 U.S. at 175. Accordingly, a probable cause determination does “not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.” Gerstein v. Pugh, 420 U.S. 103, 121 (1975).

Cann argues that Wanner acted “recklessly, wantonly, and without remorse by having the plaintiff imprisoned without any tangible proof or evidence.” I disagree. Wanner sought out the warrant and made his arrest based upon Galvin’s detailed confession. Moreover, the facts of the confession were corroborated by information uncovered by Wanner in the course of his

investigation: (1) the records of continual cell phone conversations between Cann and Galvin in the day and hours leading up to the robbery; (2) the statements of the several eyewitnesses to the robbery; (3) Ouyaing's account of the robbery; and (4) the conspirators' treatment of Cann during the robbery itself. Wanner viewed this collected evidence and, based upon his knowledge and experience as a police officer, drew the reasonable inference that Cann was likely involved in the crime. Galvin's confession and the supporting evidence constitute sufficient information to establish a reasonable ground for belief of guilt. Detective Wanner therefore had probable cause to believe that Cann had conspired to commit the offense charged.

Cann also asserts that "defendant, instead of doing his job as a Detective, decided to listen to the lies of Laurel Galvin." Cann attempts to undermine Galvin's credibility by pointing to her relapse back into her heroin addiction following her arrest for the robbery and her "jumping bail." However, these events occurred after her confession to Wanner, Wanner's application for the warrant, and Cann's arrest. Therefore, although these circumstances may cast doubt on the veracity of Galvin's confession, they are irrelevant to the determination of whether Wanner had probable cause to believe the confession and suspect Cann's complicity at the time of making the arrest. See Wright v. City of Philadelphia, 409 F.3d 595, 603 (3d Cir. 2005) ("The probable cause inquiry looks to the totality of circumstances; the standard does not require that officers correctly resolve conflicting evidence or that their determinations of credibility were, in retrospect, accurate.").

It is the responsibility of the officer to assess the factual and practical considerations available to him before arresting an individual, and the law allows the officer fair leeway in his judgments as to whether certain actors are more or less trustworthy than others. See Gates, 462 U.S. at 232 (holding that law enforcement officers are permitted to "formulate certain common-sense conclusions about human behavior."). Based on Galvin's and Cann's behavior, the other collected

objective evidence that corroborated Galvin's statements, and his own experience as a law-enforcing officer, Wanner reached the prudent and reasonable decision that the information that Galvin provided was sufficiently trustworthy. See Gates at 244-245 ("It is enough, for purposes of assessing probable cause, that corroboration through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting" information received through an informant) (internal quotations omitted). Therefore, I conclude that Wanner was well within his constitutional limits by acting on facts that led sensibly to his belief in the probability of Cann's guilt. The facts alleged by Cann are not sufficient to support a claim for false arrest and I will not credit Cann's unwarranted factual inferences as to Wanner's state of mind in seeking out the warrant and making the arrest.

B. Probable Cause With Arrest Warrant

Although Wanner possessed adequate information to lead a prudent officer to conclude that Cann was a co-conspirator in the robbery, the fact that Wanner obtained an arrest warrant is sufficient on its own to satisfy the probable cause requirement. See Kis v. County of Schuylkill, 866 F. Supp. 1462, 1469 (E.D. Pa. 2001), citing Baker v. McCollan, 443 U.S. 137, 144 (1979) ("It is well settled that probable cause to arrest generally exists when a police officer makes an arrest pursuant to a warrant that meets the requirements of the Fourth Amendment."). Contrary to Cann's allegation that Wanner "issued the warrant," Wanner filled out a warrant application and it was reviewed by a neutral and disinterested District Judge. This District Judge determined that the information that Wanner provided in the application established probable cause to issue the arrest warrant and Wanner made the arrest only after obtaining this properly verified warrant.

1. Facially Invalid

Because Wanner obtained this warrant prior to the arrest, Cann must prove that the warrant

was “facially invalid” for his false arrest and false imprisonments claims to succeed. To establish that a warrant is facially invalid, “it must appear that the process used for the arrest was void on its face or that the issuing tribunal was without jurisdiction; it is not enough that the charges were unjustified.” Olender v. Township of Bethlehem, 32 F. Supp. 2d 775, 791 (E.D. Pa. 1999). Although not specifically stated in his complaint, Cann appears to assert that the process used for the arrest was void on its face by focusing on alleged misstatements in the affidavit of probable cause that Wanner filed to obtain the warrant.

A plaintiff who attempts to challenge the validity of a warrant by “asserting that law enforcement agents submitted a false affidavit to the issuing judicial officer must satisfy the two-part test developed by the Supreme Court in Franks v. Delaware, 438 U.S. 151, 171 (1978).” Sherwood v. Mulvihill, 113 F.3d 396, 400 (3rd Cir. 1997). Under the Franks test, “the plaintiff must prove, by a preponderance of the evidence, (1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that such statements or omissions are material, or necessary, to the finding of probable cause.” Sherwood, 113 F.3d at 400. Put another way, plaintiff must show first that the affidavit consists of “intentionally or recklessly false statements”; and second that the affidavit “purged of its falsities” would be inadequate for a showing of probable cause. Roberts v. Toal, No. 94 - 0608, 1997 U.S. Dist. LEXIS 1836 at *25 (E.D. Pa. Feb. 20, 1997) citing Franks, 438 U.S. at 171. Similarly, in Rugendorf v. United States, the Supreme Court held that “factual inaccuracies” in an affidavit that are “of only peripheral relevancy to the showing of probable cause” and that are not “within the personal knowledge of the affiant” cannot be used to “destroy probable cause.” 376 U.S. 528, 532 (1964).

In Gates v. Illinois, the Supreme Court emphasized that “after-the-fact scrutiny by courts of

the sufficiency of an affidavit should not take the form of *de novo* review” and that a District Justice’s “determination of probable cause should be paid great deference by reviewing courts.” Gates, 462 U.S. 213, 236 (1983). Additionally, “courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner.” Id. The proper interpretation of the affidavit requires simply “that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.” Id. at 232.

In his response to Wanner’s motion to dismiss, Cann argues that Wanner “seeks to mislead the court” in four ways. He begins by alleging that the affidavit is inconsistent with the motion to dismiss. He contends that Wanner described Kretz’s observations of the robbery in his motion to dismiss but did not mention Kretz as a witness in the affidavit and claims that this discrepancy demonstrates one of Wanner’s attempts to “mislead the court.” This alleged discrepancy fails to satisfy the Franks test. First, there is no evidence that Wanner’s statements in his affidavit were false simply because he cited Kretz’s description of the crime in his motion to dismiss but cited different witnesses in his affidavit; in his motion to dismiss, Wanner is not precluded from including information uncovered during investigations that occurred after the affidavit. Second, the statements in the affidavit that described the other witnesses’ observations were not necessary to the finding of probable cause, but rather of peripheral relevancy because even if purged from the record, there would still be adequate evidence to establish probable cause based upon Ouyaing’s account of the robbery and Galvin’s confession.

Cann also states that Wanner contradicted himself with respect to Cann’s wallet being stolen. Again, this alleged factual inaccuracy does not constitute a false statement; although Wanner describes this aspect of the robbery slightly differently in each document, he is consistent in his

assertion that Cann's wallet was not stolen. However, as with the witnesses' statements, even if this supposed inconsistency were purged from the record, Galvin's confession, Ouyaing's statement, and the fact that Cann survived the robbery unscathed constitutes sufficient support for a showing of probable cause.

Cann further argues that Wanner attempts to "mislead the court" by not providing evidence of the cell phone records upon which he based his claim that Cann and Galvin had been in contact leading up to the robbery. However, Cann's mere bald assertion of doubt as to the existence of these records does not indicate that Wanner misrepresented the truth by using them in the affidavit; law enforcement officers need not produce documentary evidence to establish probable cause. See Gates, 462 U.S. at 232 (holding that the probable cause inquiry does not require that "each factual allegation which the affiant puts forth must be independently documented."). Nevertheless, even if Wanner's statements with respect to these cell phone records were declared false and purged from the record, there would still be adequate evidence to support the probable cause determination.

Cann's final argument as to Wanner's alleged attempt to "mislead the court" concerns Wanner's inclusion of information in the affidavit that Cann himself had not confirmed in a confession. With respect to claims external to his own account of the robbery, Cann seems to allege that because Wanner believed Galvin's confession and filled out a warrant application based on her word, Wanner recklessly disregarded the truth in the affidavit, thereby rendering the subsequent warrant deficient. However, as discussed above, the Supreme Court in Franks holds that to render a warrant invalid, the requisite claims of "deliberate falsehood or reckless disregard for the truth" in the affidavit "must be accompanied by an offer of proof." Franks, 438 U.S. at 171. The fact that Cann himself never admitted the crime and that Wanner believed Galvin and suspected Cann is not proof that Wanner intentionally or recklessly made false statements. See Franks at 165 ("When the Fourth

Amendment demands a factual showing sufficient to comprise probable cause, the obvious assumption is that there will be a *truthful* showing (emphasis in original). This does not mean “truthful” in the sense that every fact recited in the warrant affidavit is necessarily correct But surely it is to be “truthful” in the sense that the information put forth is believed or appropriately accepted by the affiant as true.”). There is no evidence that Wanner disregarded the truth by supporting his affidavit with statements from Galvin’s confession. Cann cannot prove that Wanner did not believe the information he put forth; nor can he prove that Wanner did not appropriately accept this information as accurate. Wanner is not required to document every factual allegation he makes in his affidavit; it is sufficient that he presented the District Justice with enough information to enable him to make the judgment that the charges were sufficiently supported to justify the issuance of the warrant.

Similarly, the Supreme Court has held that the “deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant.” *Id* at 171. Whether or not Galvin deliberately misrepresented the truth to Wanner is irrelevant to the issue of whether Wanner submitted an affidavit that could be held false under the Franks standard. These alleged misrepresentations asserted by Cann were not within Wanner’s personal knowledge but rather based upon external information that Wanner deemed trustworthy; and as noted above, the probable cause standard does not require that officers’ determinations of credibility were accurate in retrospect. Wright, 409 F.3d at 603. It suffices if Wanner believed Galvin’s account of the robbery and was justified in accepting it as true. The District Justice concluded that Wanner was so justified and there is no evidence to suggest otherwise. Therefore, these alleged falsehoods do not preclude a finding of probable cause. Accordingly, the affidavit and the warrant are valid and I will grant Wanner’s motion to dismiss on Counts I and II.

II. Count III - Intentional Infliction of Emotional Distress

The Supreme Court has held that federal courts have the power to hear state law claims that “derive from a common nucleus of operative fact” with federal claims. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966). The federal and state claims must be associated such that a “plaintiff would ordinarily be expected to try them all in one judicial proceeding.” Id. Once a court disposes of a plaintiff’s federal claims, the decision to retain jurisdiction lies within the court’s discretion. Shaffer v. Bd. of Sch. Dist. of Albert Gallatin Area Sch. Dist., 730 F.2d 910, 912 (3d Cir. 1984). The Court of Appeals has held that in exercising its discretion, “the district court should take into account generally accepted principles of judicial economy, convenience, and fairness to the litigants.” Growth Horizons, Inc. v. Del. County, Pa., 983 F.2d 1277, 1284 (3d Cir. 1993). In this case, Cann’s intentional infliction of emotional distress claim arises out of Wanner’s investigation and Cann’s arrest and imprisonment. I find there to be a common nucleus of operative fact and I will exercise supplemental jurisdiction.

In support of his claim for intentional infliction of emotional distress, Cann argues that: (1) by falsely arresting and imprisoning him, Wanner caused him to have a relapse in his psychological therapy; (2) Wanner intended him to suffer extreme emotional distress by his actions; and (3) he is now suffering from mental anguish, nervous shock, and depression. Wanner argues that the intentional infliction of emotional distress claim should be dismissed for failure to state a claim because Cann is unable to demonstrate that Wanner’s conduct is sufficiently “extreme and outrageous” to meet the rigorous standard set forth by the Pennsylvania Supreme Court. I agree.

To succeed on a claim of intentional infliction of emotional distress, plaintiff must allege that defendant’s conduct is “so extreme and outrageous as to cause plaintiff emotional distress.” Bougher v. Univ. of Pittsburgh, 882 F. 2d 74, 80 (3d Cir. 1989). Although the Pennsylvania Supreme Court

has “never expressly recognized a cause of action for intentional infliction of emotional distress,” the Court has cited §46 of the Restatement (Second) of Torts as “setting forth the minimum elements necessary to sustain a cause of action.” Taylor v. Albert Einstein Med. Ctr., 562 Pa. 176, 181 (Pa. 2000). There are four requisite elements that a plaintiff must prove to prevail on this claim under §46: “(1) the defendant engaged in conduct that was extreme or outrageous; (2) it must have been intentional or reckless; (3) it must cause emotional distress; and (4) that distress must be severe.” Olender v. Township of Bethlehem, 32 F.Supp. 2d 775, 791-792 (E.D. Pa. 1999), citing Hoy v. Angelone, 554 Pa. 134, 151 (Pa. 1998). Furthermore, under Pennsylvania law, in order to prove this claim, the conduct alleged must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” Hoy, 554 Pa. at 151. In other words, “it has not been enough that the defendant acted with intent which is tortious or even criminal, or that he has intended to cause emotional distress, or even that his conduct has been categorized as ‘malice’, or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.” Id. Due to this stringent standard, courts have reserved recovery for claims of intentional infliction of emotional distress for only “the most clearly desperate and ultra extreme conduct.” Id. at 152.

As discussed above, I concluded that Wanner had a valid warrant and probable cause to make the arrest. I necessarily decided that Wanner’s conduct in arresting and detaining Cann was objectively reasonable and prudent. It therefore follows that Wanner’s actions in the course of properly executing his duties as a police officer do not, as a matter of law, rise to such a level as to be regarded as atrocious or utterly intolerable in civilized society. Furthermore, there is no evidence that Wanner intentionally or recklessly caused Cann to suffer extreme emotional distress through these actions. I will not credit Cann’s bald assertion that Wanner intended to cause him harm. The law

gives officers considerable and necessary flexibility and trust in choosing how to handle the often ambiguous situations with which they are faced. Brinegar, 338 U.S. at 176. I conclude that Wanner conducted his investigation with sufficient caution and commonsense, that Cann's complicity in the robbery was a rational probability, and that Wanner was fully within the bounds of decency in making the arrest. Under no reasonable reading of Cann's allegations do Wanner's actions approach the desperate and extreme conduct required by Pennsylvania courts to sustain a cause of action for intentional infliction of emotional distress. Therefore, Wanner's motion to dismiss on Count III will be granted.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK STEVEN CANN

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CIVIL ACTION

v.

HAROLD ROBERT WANNER

No. 05-5189

ORDER

AND NOW, this 28th day of June 2006, upon consideration of defendant's motion to dismiss and plaintiff's response thereto and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendant's motion to dismiss is GRANTED and plaintiff's complaint is DISMISSED.

The CLERK OF COURT is DIRECTED to close this case statistically.

s/ Thomas N. O'Neill, Jr. _____

THOMAS N. O'NEILL, JR., J.